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No. 84-102

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ALFRED F. CATINO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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80 pp

QUESTIONS PRESENTED

1. Can a person become a fugitive from justice while remaining in his jail cell?

2. Is it constitutionally permissible to compel a waiver of rights under the Statute of Limitations because of the correct assertion of a claim against extradition?

3. Does venue in a criminal case for a crime committed outside of the United States lie in the Southern District of New York when the defendant was "first brought" back to the United States in the Eastern District of New York?

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The opinions of the United States District Court for the Southern District of New York (GAGLIARDI, J.) are unreported but are contained in the appendix to this petition. The opinion of the United States Court of Appeals for the Second Circuit is not yet reported but is set forth in the appendix to this petition.

JURISDICTIONAL STATEMENT

The date of the opinion of the Court of Appeals is May 24, 1984. This petition is filed within sixty days of that opinion. The statutory provision conferring certiorari jurisdiction is 28 U.S.C. sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. sec.3282:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the

indictment is found or the information is instituted within five years next after such offense shall have been committed."

18 U.S.C. sec. 3290:

"No statute of limitations shall extend to any person fleeing from justice."

18 U.S.C. sec. 3238:

"The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender...is arrested or is first brought..."

STATEMENT OF THE CASE

Petitioner, Alfred Catino, was convicted in the United States District Court for the Southern District of New York on November 18, 1983 following his entry of a plea of guilty to a two count indictment charging him with the crimes of bail jumping (18 U.S.C. sec. 3150) and unlawful use of a United States passport (18 U.S.C. sec. 1542). Petitioner was sentenced to a term of three years imprisonment on the bail jumping charge,

to run consecutively with a sentence of 12 years' imprisonment he was then and is now serving, and to a suspended sentence on the passport count.

Prior to the entry of his guilty plea, petitioner had moved to dismiss the indictment on the grounds that (a) the bail jumping charge had been brought outside the applicable statute of limitations, and (b) venue had been improperly laid in the Southern District of New York on the passport charge. The district court denied the motions in all respects. By agreement with the government and pursuant to local rules, however, the plea of guilty was entered subject to petitioner's right to appeal the legal issues raised by his motions to dismiss the indictment.

On May 24, 1984, the United States Court of Appeals for the Second Circuit

(Lumbard, Newman and Pratt, JJ) affirmed petitioner's conviction in a written opinion. Petitioner prays that a writ of certiorari issue to that court for the reasons set forth below.

STATEMENT OF FACTS

In January, 1974, petitioner was convicted in the Southern District of New York of a violation of the federal narcotics laws. Free on bail pending appeal, petitioner failed to surrender following the affirmance of his conviction by the United State Court of Appeals for the Second Circuit. On March 17, 1975, the district court issued a bench warrant for his arrest (hereinafter "the first fugitive warrant").*

In February, 1977, Catino was

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*Parenthetical references preceded by the prefix "A" are to pages of the appendix to petitioner's brief to the Court of Appeals.

spotted in France by French police working in cooperation with agents of the United States Drug Enforcement Administration ("DEA"). On March 1, 1977, at the behest of the United States Attorney for the Southern District of New York, the United States formally asked the French government to authorize petitioner's provisional arrest and detainment for extradition to the United States pursuant to the first fugitive warrant (A5, A6, A16, A17).

On March 4, 1977, however, petitioner was arrested by French police and charged with violations of the French narcotics laws and with having used a false passport to enter the country (A6, A16, A17, A41-42).

On March 12, 1977, advised of the United States' request for his extradition, Catino formally waived

extradition and consented to his return to the United States (A12). On March 15, 1977, Catino wrote to DEA agent Ronald Provencher, who had participated in Catino's arrest by the French police, and requested the help of Assistant United States Attorney James Lavin in securing his return to the United States (A6, A19). On March 18, 1977, the French authorities, having completed processing of the United States' March 1, request, formally detained defendant by provisional arrest for extradition pursuant to the first fugitive warrant (A6, A18).

Thereafter, however, the United States Attorney's Office for the Southern District of New York ignored repeated pleas from Justice and State Department Officials for documentary materials necessary to perfect extradition, and

forced the government to abandon the extradition proceedings (A7, A21-32). On May 16, 1977, the French court (La Chambre D'Accusation De La Cour D'Appeal De Paris) granted the United States' request to withdraw its earlier demand for Catino's extradition. (A33-40)

In the meantime, petitioner's French prosecution proceeded apace. Catino was charged in France with having conspired to export and with exporting heroin from France to the United States and with having used a falsely obtained passport to enter France (A43-62). The narcotics offenses alleged against petitioner by the French government arose out of his participation in the shipment of a quarter-kilogram of heroin from Roissy, France to John F. Kennedy International Airport in New York. The same transaction also gave rise to Catino's

indictment in absentia for a violation of the U.S. narcotics laws in the Eastern District of New York on April 22, 1977 (United States v. Catino, 77 Cr. 248, E.D.N.Y.) (A41, A71-73).* Pursuant to that indictment, the district court issued a warrant for defendant's arrest the same day (hereinafter "the second fugitive warrant") (A41).

On October 19, 1977, the United States once again sought Catino's extradition, this time in connection with the Eastern District indictment. Petitioner opposed the second extradition request on the ground that, under the Franco-American treaty of extradition, his conviction in France for narcotics violations would bar his extradition to

*The Court of Appeals' opinion incorrectly recites the date of this indictment February, 1977 (4007).

the United States for trial upon an indictment alleging the same offenses, or their functional equivalent under American law. Thus, petitioner opposed the second extradition solely to avoid multiple prosecutions and multiple punishment for a single set of unlawful acts (A66-62).

Largely because of the repeated failure of the United States to timely submit supporting data to the French court, the extradition proceedings dragged on for more than a year (A43-54, A71-74). During their pendency, Catino was convicted on the French narcotics violations and the passport charge and sentenced to five years imprisonment and a fine in excess of 5.3 million francs on November 13, 1978 (A74).

On November 13, 1978, after having reviewed the documents submitted by

Catino's Eastern District prosecutors, the French government opposed the extradition on the same grounds earlier articulated by Catino (A74). On December 20, 1978, the court (La Chambre D'Accusation De La Cour D'Appeal De Paris) sustained the objections to extradition jointly espoused by Catino and the French prosecutor and dismissed the second extradition request. (A55-62).

On January 21, 1981, Catino, having completed his French sentence, was placed on board an Airfrance jetliner bound for the United States. Upon his arrival at John F. Kennedy Airport, he was arrested by DEA agents pursuant to the second fugitive warrant (A8, A41-42). On April 3, 1981, the Eastern District indictment was dismissed upon the government's motion and in light of petitioner's

conviction and punishment in France for the same offenses as those charged in the Eastern District indictment (A9, A41-42).

On April 3, 1981, immediately following the termination of proceedings against him in the Eastern District, petitioner was transferred to the custody of U.S. Marshals pursuant to the first fugitive warrant. Catino thereafter was transported to Raybrook Federal Correctional Institution (FCI) in Raybrook, New York to commence the service of the sentence imposed upon him in January, 1974.

On October 18, 1982, five years and seven months after he had waived extradition on the bail jumping charge, Catino was first indicted for it. In February, 1983, after petitioner moved to dismiss this indictment on statute of limitation grounds, the Southern District

filed a superseding indictment, adding a count of unlawful use of an American passport, a charge subject to an unusual ten year statute of limitations. The district court denied Catino's motions to dismiss the indictment and the superseding indictment (A89-96). Pursuant to an agreement with the government preserving his rights of appeal from the denial of those motions, petitioner entered a plea of guilty to the superseding indictment.

REASONS FOR GRANTING THE WRIT

POINT I

PROSECUTION ON THE BAIL JUMPING CHARGE IS BARRED BY THE STATUTE OF LIMITATIONS

The issue in this case is whether a person can become a fugitive from justice while remaining in his jail cell.

This issue arises from a chain of events beginning with petitioner's flight from the United States while on bail pending appeal. Though clearly a fugitive while so at large, Catino's flight from justice terminated when he was arrested in France and when he submitted himself to American authorities by repeatedly requesting return to the United States and by signing a waiver of extradition. The United States, however, withdrew its extradition request, and Catino remained in jail in France for the next four years owing to his conviction

for a narcotics offense in that country.

Five months after the Southern District changed its mind about seeking Catino's return on the first fugitive warrant, a second extradition request was initiated at the behest of the Eastern District in connection with a new narcotics indictment. This second extradition was opposed by the French court on the ground that it was based upon an indictment charging Catino with the same crimes for which was then imprisoned in France. The correctness of the French court's holding was later confirmed by the Eastern District itself when it moved for the indictment's dismissal upon Catino's return from France.

Nevertheless, the courts below held that solely because Catino had challenged the Eastern District's extradition

request, he automatically became a fugitive from justice, tolling the statute of limitations and preserving the right of the Southern District to first indict him for the March, 1975 bail jump in October, 1982. Thus Catino was held to have "fled from justice" without leaving his jail cell, without making is whereabouts unknown, and while being credited by the Eastern District for the time he served during this period of "flight from justice." Such a result cannot survive without a gross distortion of the meaning of "flight from justice."

Flight from Justice

The federal statute of limitations, 18 U.S.C. Section 3282, provides that non-capital crimes including bail jumping under 18 U.S.C. Section 3250, may be prosecuted only if an indictment is

brought within five years of the commission of the offense. The statute does not "extend to any person fleeing from justice" 18 U.S.C. sec. 3290. Since bail jumping, like the crime of escape, involves flight from justice, "the statute of limitations is tolled for a the period that the escapee remains at large." United States v. Bailey, 444 U.S. 394, 414 (1980). Thus, once a defendant's status as a person "fleeing from justice" terminates, the five-year period of of limitations begins to run in his favor. United States v. Parrino, 180 F.2d 613 (2nd Cir. 1945).

Although the United States Code does not define "fugitive" or "person fleeing from justice", case law has elucidated these terms. To be and to remain a "fugitive" or a "person fleeing from justice" one must secrete himself to

avoid detection or prosecution. See, 22 C.J.S., Criminal Law, Section 230 (collecting cases), United States v. Salzmann, 548 F.2d 395, 403 n.2 (2nd Cir. 1976) (Feinberg, J., concurring). Thus, mere absence from the jurisdiction does not toll the statute of limitations. Jhirad v. Ferrandina, 486 F.2d 442 (2nd Cir. 1973). Indeed, where, as in the instant case, a defendant is under involuntary incarceration outside the United States, he is not a fugitive while so incarcerated since his whereabouts are not secret an he is not avoiding detection or prosecution. United States v. Hewecker, 79 F. 59 (2nd Cir. 1896).

In the instant case, petitioner's status as a person "fleeing from justice" came to an abrupt end in March, 1977 when he was arrested in France and detained at the request of the United

States pending extradition. From that point forward, his whereabouts were no secret to the government; indeed, during March, April and May, 1977, Catino was visited by and was in communication with numerous officials of the government, including DEA agents, an Assistant United States Attorney for the Southern District of New York and representatives of the State Department assigned to the United States Embassy in Paris. The evidence shows that the petitioner did not, following his arrest in France, "intend to void prosecution" for the instant offense. Instead, aware of the possibility that bail jumping charges might be lodged against him, Catino affirmatively sought his return here and formally waived his right to object to an anticipated American request for his extradition.

Indeed, the district court fully agreed that Catino was no longer a fugitive after he waived extradition:

> "The court agrees with defendant that the statute of limitations began to run once he executed forms while in French custody consenting to extradition to the United States. The Government concedes that a person who is fleeing from justice may regain the benefit of the statute of limitations by taking affirmative steps to make himself available for prosecution. The Government claims, however, that defendant was simply attempting to avoid prosecution on the pending French charges, that he reversed his position as soon as he realized that extradition would follow any French term of imprisonment, and that his agreement to be extradited therefore was not a good faith, unconditional surrender to the United States authorities.
>
> The Government's argument is unpersuasive. Defendant's motive for consenting to extradition has no bearing upon whether he ceased to be "fleeing from justice" within the meaning of section 3290. If, as defendant claims, he voluntarily consented to the

anticipated extradition request, see note 4 supra, then he clearly regained the benefit of the statute of limitations as of that time. See United States v. Gonsalves, 675 F.2d 1050, 1055 (5th Cir. 1982) (statute runs anew once defendant makes a good faith effort to surrender); United States v. Greene, 146 F. 803, 890 (S.D. Ga. 1906), aff'd, 154 F. 401 (5th Cir.), cert. denied, 207 U.S. 596 (1907) (defendants who resisted extradition could change their status as persons fleeing from justice by submitting to the jurisdiction of the court) (A92).

The Eastern District Extradition:

The courts below held that Catino's resistance to an extradition request from the Eastern District of New York in October, 1977 restored him to fugitive status. This holding was error. It may be the case that a fugitive remains a fugitive while dilatorily resisting extradition, since, by such resistance, he persists in a continuing effort to

evade justice. However, it is both paradoxical and contrary to due process of law to hold that someone who is not a fugitive becomes one by challenging an unlawful extradition.

First, the holding means that a nonfugitive, under arrest and incarceration, whose whereabouts are know, becomes a fugitive without moving from his place of confinement. This defies common understanding.

Second, when Catino was returned to the United States to face prosecution in the Eastern District, the government moved to dismiss the charges because he had already been prosecuted an punished for them in France. If the Eastern District federal prosecutors considered petitioner a convict during this period, properly serving a sentence on the charge for which they had sought his

extradition, he can hardly be regarded as simultaneously "fleeing from justice" by the Southern District.

Third, the reason why Catino resisted extradition on the Eastern District charge was because it was based upon the same conduct for which he was being prosecuted in France. He sought only to avoid a double punishment for the same acts. He did not seek to conceal himself for the purpose of avoiding prosecution. Since the courts of France denied the extradition, it is unreasonable to regard Catino as a fugitive when his failure to return was commanded by the Courts.

Fourth, petitioner's opposition to the second extradition request was virtually irrelevant to the ultimate determination of those proceedings unfavorably to the United States. As the

record clearly shows, the French prosecutors advised the court that the U.S. extradition request was "not receivable" because it was barred by the terms of the applicable treaty (A74). In the end, the petitioner made no presentation to the court; he simply adopted the arguments advanced by the French prosecutor. Thus, since nothing petitioner could have said or done would have affected the outcome of those proceedings, it cannot be maintained that his opposition to the extradition rendered him a "fugitive from justice."

Fifth, the courts below held that the statute of limitations was "tolled" during some of the pendency of the second extradition proceedings, that is, from December 14, 1977, when petitioner formally entered his opposition to the extradition, until December 20, 1978,

when the French court held that the extradition request "should be refused" (A93). The government's own records show that the ultimate disposition of its extradition request consumed more than a year largely because of the failure of the Departments of State and Justice to make timely submissions of documents requested by the French court (A67, A80-88). If, as petitioner contends, it is singularly strange to say that petitioner became a "fugitive" solely by opposing extradition, it is stranger still to say that he ceased to be a fugitive once the French court sustained his opposition as correct; it is strangest of all to say that he was thus "at large" for more than a year, not solely by virtue of his opposition, but largely because of the United States' failures to meet filing deadlines imposed by the French court.

The effect of the courts' holding in the instant case is that the government, the party against whom the statute of limitations runs, may arbitrarily prolong the tolling of the statute by the sheer weight of its own inefficiency.

The Court of Appeals Opinion

The Second Circuit held that petitioner's decision to oppose the second extradition showed his intent to flee from prosecution and thus amounted to a "constructive flight from justice." This reasoning is unsound. First, an intent to flee does not convert a non-fugitive into a fugitive. If it did, then anyone charged with a crime, or on trial, or in prison, would become a fugitive by virtue of his desire to be some place else. Something more than a mental element is required; some act of removal and secretion is also necessary.

One who is a "fugitive" in his mind alone is no fugitive in law.

Moreover, by contesting the second extradition, Catino did not intend to flee from prosecution. To the contrary, he opposed extradition solely because he was already being prosecuted in France for the very narcotics offense for which his extradition was sought. By invoking a just claim under the Franco-American extradition convention, he sought only to avoid double prosecution for the same offense. The applicable treaty barred extradition under such circumstances; the Fifth Amendment's double jeopardy clause does not. Hence, Catino asserted his claim in the only forum available to him. Had he waited until his return to the United States, the claim would have been waived.

Indeed, petitioner's resistance to

the second extradition is more appropriately viewed as an attempt to pursue justice, rather than flee from it. Were the situation reversed, and a French national, for instance, appealed to this Court to interpret his rights under an extradition treaty, it would surely be dismaying to have a French court later declare that petitioner was a fugitive from justice for seeking vindication in this Court. It would be even more disturbing where the American government and the Court agreed that petitioner was correct in his claim.

The Court of Appeals went to some length to point out that it was not troubled by forcing petitioner to lose the benefit of the statute of limitations as a result of choosing to oppose extradition. That court cited McGautha v. California, 402 U.S. 183, 213 (1970)

for support in holding that petitioner could constitutionally lose one right by asserting another. But McGautha concerned a situation where a defendant waived his privilege against self-incrimination by choosing to testify. Those two rights could not consistently be claimed at the same time. Here, there is no inherent conflict in opposing extradition, on the one hand, and seeking to claim the benefit of the statute of limitations, on the other. Thus, this case falls within the ambit of Simmons v. United States, 390 U.S. 377 (1967) and Garrity v. New Jersey, 385 U.S. 493 (1967), where forcing such a choice of rights amounted to an unconstitutional burden.

In sum, petitioner ceased to be a fugitive upon his arrest in France and his several expressions of willingness to

return to the United States to face the charges he knew would be lodged against him there. He did not become a fugitive anew merely because he opposed extradition in connection with a different case on the ground that he was then and there subject to French prosecution for the same acts. By its affirmance of petitioner's conviction, the Court of Appeals stretched the meaning of "flight from justice" into the zone of legal fiction, contrary to the well settled rulings of this Court that the statute of limitations is to be construed liberally in favor of repose and the defendant. United States v. Marion, 404 U.S. 307 (1971). Accordingly, as petitioner was not indicted for bail jumping until more than five years and seven months after he ceased to be a person "fleeing from

justice", this Court should grant certiorari, reverse petitioner's conviction and direct dismissal of the indictment.

POINT II

THE SOUTHERN DISTRICT OF NEW YORK LACKED JURISDICTION TO TRY PETIONER FOR THE PASSPORT VIOLATION COMMITTED IN FRANCE

The petitioner was charged in the superseding indictment with misuse of an American passport seven years ago.* The indictment alleged the crime was committed at Charles De Gaulle Airport in Paris, France.

Venue for crimes committed outside any district is controlled by 18 U.S.C. 3238. The statute provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the

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* Though Catino received a suspended sentence on this count, the conviction itself affects his parole status and release date. Thus, the sentence does not make the issue moot. Petitioner received a suspended sentence because the acts underlying the crime were identical to the acts giving rise to Catino's conviction, under French law, for "using a false document" to enter the country.

> offender ... is arrested or is first brought ...

This statute, dating back to 1790, provides a simple solution for the problem of fixing the place of trial for crimes committed outside the country. It vests jurisdiction in the district where the defendant is "arrested or first brought", thereby avoiding conflicting claims by any or every federal prosecutor within the United States. Venue is exclusive in the district where the defendant is first taken into custody, and not concurrent. United States v. Townsend, 219 F. 761 (S.D.N.Y. 1915); United States v. Provoo, 124 F.Supp. 185, 191 (S.D.N.Y. 1954); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); United States v. Best, 184 F.2d 131 (1st Cir. 1950); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973); Kerr v. Shine,

136 F. 61 (9th Cir. 1905).

In the present case, Catino was placed on an airplane in Paris and flown directly to Kennedy Airport in the Eastern District of New York. He was met at the plane by DEA agents who arrested him there. They had in their possession an Eastern District warrant issued by Judge Platt. Plainly, the district in which the defendant was both "arrested" and "first brought" was the Eastern District of New York. That district therefore has exclusive jurisdiction over any crime committed outside the United States. By the same token, the Southern District has improperly brought this prosecution.

The Southern District did not dispute these facts. It conceded that the Eastern District could have prosecuted Catino for the passport

violation, but argued that he was arrested at Kennedy Airport on a narcotics case, and not on the passport case. He was first arrested for the passport crime, they contended, when this superseding indictment was brought, while he was incarceration in the Southern District awaiting trial on the bail jumping charge. This attempt to sidestep 18 U.S.C. sec. 3238 and claim a second venue in the United States for a crime committed in Europe is without merit.

First, while the Eastern District could have indicted Catino for the passport violation, its failure to do so does not thereby confer the right to proceed to any or every other federal prosecutor who decides he would like to bring the charge. The intent of 18 U.S.C. sec. 3238 was to fix an exclusive venue for crimes committed outside the

United States; it does not grant a second venue to some other district because the proper district declines prosecution. "Jurisdiction is not in the alternative, but rather where it involves one who was brought into a district, that district alone has jurisdiction." United States v. Provoo, 124 F.Supp. 185, 191 (SDNY 1954). Suppose Catino had not only used the passport in France, but had traveled with it to England, Belgium and Germany. Would the failure of the Eastern District to prosecute allow, say, California to indict and writ him in for the use of the passport in England, and Texas then to prosecute him for the entry into Germany, and Nebraska for its use in Belgium? Such an interpretation would defeat the economy of the venue statute, and allow the government to handpick the venue in derogation of the "first brought"

provision of the statute, a practice condemned in United States v. Provoo, 215 F.2d 531, 539 (2nd Cir. 1954). The only reasonable interpretation of the statute which would preserve its intent would be to require venue in the district where the defendant is first brought or arrested for all crimes committed abroad, to the exclusion of venue elsewhere if the first district declines prosecution. Otherwise, any other federal prosecutor in the country who disagrees with the decision not to prosecute could arrogate venue to his district. As this Court stated in United States v. Johnson, 323 U.S. 273, 275 (1945), "questions of venue in criminal cases ... are not merely matters of formal legal procedure. They are deep issues of public policy in the light of which legislation must be construed." The policy of 18 U.S.C. sec.

3238 is subverted by this attempt of the Southern District to prosecute for a crime which the Eastern District declined to charge. The Eastern District did not proceed with the passport charge because it knew Catino had been tried, convicted and sentenced for it in France, over and above his conviction for the narcotics crime there. Indeed, refusal to prosecute a second time, while not commanded by the double jeopardy clause, is nevertheless "a firmly established policy, known as the 'Petite' policy." Thompson v. United States, 444 U.S. 248 (1980); Petite v. United States, 361 U.S. 529 (1960). The Department of Justice Manual for the United States Attorneys states:

> It is the general policy of the Department of Justice, not a prohibition of the double jeopardy clause, that several offenses arising out of a single transaction should not

> be the basis of successive federal prosecutions, nor would a violation already prosecuted at the state or local level be federally prosecuted without the approval of the Attorney General. Petite v. United States, 361 U.S. 529 (1960). Such approval is to be predicated only upon a clear showing of a compelling federal interest in a second prosecution, sufficient to override the policy. This is designed to protect the individual from needless multiple prosecution, to promote fairness, and to provide for orderly and efficient law enforcement. (Manual, 7-4).

The government argued below that the Petite Policy was not violated and that, in any case, it is unenforceable against the government. In this regard, the government alleged that the Department of Justice has "informally" decided not apply the policy where the prior conviction was obtained in another country. Despite this assertion, it is apparent that the Petite Policy was in

fact applied in this case by the Eastern District when it dismissed its narcotics indictment because Catino had been already convicted and punished for it in France. Moreover, petitioner does not argue that the Petite Policy is strictly enforceable against the government in the normal case. The distinguishing factor here is that the government itself, acting through its Eastern District prosecutors, has already enforced the policy. For the Southern District to disregard and, in effect, abrogate that decision amounts to a form of "uneven justice" within the Federal system that is at the heart of this Court's supervisory powers.

In sum, then, the Southern District prosecuted the petitioner for a seven year old violation where venue was properly lodged in the Eastern

District; where the petitioner has already been convicted of the offense by another sovereign; and where prior approval for the second prosecution has not been obtained from the Attorney General, as required by the government's own guidelines. In these circumstances, the count should have been dismissed.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

- against - 82 Cr. 706

ALFRED CATINO,

Defendant.
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MEMORANDUM DECISION

Gagliardi, D.J.

Defendant Alfred Catino is charged with failing to appear before the United States District Court on March 17, 1975 in violation of 18 U.S.C. Section 3150. Presently before the court is defendant's motion to dismiss the indictment on the grounds that the prosecution is barred by the statute of limitations and by the Southern District's Plan for Prompt Disposition of Criminal Cases.

Background

Defendant was convicted of

violating the federal narcotics laws on January 17, 1974 following a jury trial before Judge Pollack of this court. He was released on bail pending appeal after sentencing on February 26, 1974. After the conviction was affirmed on appeal, defendant failed to surrender as directed and a bench warrant was issued for his arrest.

Defendant evaded the authorities until February 1977 when the United States Attorney's Office for the Southern District of New York was informed that defendant had been observed in France by French police and agents of the United States Drug Enforcement Adminstration ("DEA"). French police arrested defendant on March 4, 1977 and charged him with violations of the French narcotics laws. On March 18, 1977, while in French custody, defendant was formally

detained by provisional arrest for extradition to the United States.

Defendant asserts in an affidavit that on March 12, 1977 he formally consented to be extradited to the United States by executing forms given to him by offcials at the French Ministry of Justice. However, on April 27, 1977, the United States withdrew its extradition request pending resolution of the French charges.[1] Some time thereafter, defendant elected to resist his return to the United States if extradition proceedings were renewed. October 10, 1977 he wrote to the United States Embassy in paris arguing that he could not be extradited on the Southern District charges.[2] In addition, on December 14, 1977, defendant opposed an extradition request to return him to the United States to face narcotics charges

filed in the United States District Court for the Eastern District of New York.[3]

Defendant completed his sentence in France and on January 21, 1981 was placed aboard an airplane bound for John F. Kennedy International Airport in New York. DEA agents arrested him at the airport on the Eastern District charges. After those charges were dismissed on April 3, 1981, defendant was taken into custody pursuant to the bench warrant issued by Judge Pollack on March 17, 1975. The instant indictment for failing to appear was filed on October 18, 1982.

Discussion

A. Statute of Limitations

Defendant claims that this prosecution is barred by the statute of limitations set forth at 18 U.S.C. Section 3282 which provides with regard

to non-capital offenses that the indictment or information must be filed within five years after the offense is committed. It is undisputed that the offense was committed on March 17, 1975 and that defendant was not indicted until October 18, 1982, more than 7 years later. Under 18 U.S.C. Section 3290, however, "[n]o statute of limitations shall extend to any person fleeing from justice." The parties agree that defendant was a person "fleeing from justice" during the period between March 17, 1975 when he jumped bail until March of 1977 when he was arrested in France. Therefore, the statute of limitations was undisputably tolled during that two year period. Defendant contends that once he was arrested by French officials he ceased to be a fugitive and therefore the statute of limitations began to run anew

as of that date. The Government contends that defendant never renounced his fugitive status and that, in any event, the statute was tolled anew when defendant opposed the Government's extradition request in 1977.

The court agrees with defendant that the statute of limitations began to run once he executed forms while in French custody consenting to extradition to the United States.(4) The Government concedes that a person who is fleeing from justice may regain the benefit of the statute of limitations by taking affirmative steps to make himself available for prosecution. The Government claims however, that defendant was simply attempting to avoid prosecution on the pending French charges, that he reversed his position as soon as he realized that extradition

would follow any French term of imprisonment, and that his agreement to be extradited therefore was not a good faith, unconditional surrender to the United States authorities.

The Government's argument is unpersuasive. Defendant's motive for consenting to extradition has no bearing upon whether he ceased to be "fleeing from justice" within the meaning of section 3290. If, as defendant claims, he voluntarily consented to the anticipated extraditon request, see note 4 supra, then he clearly regained the benefit of the statute of limitations as of that time. See United States v. Gonsalves, 675 F.2d 1050, 1055 (9th Cir. 1982) (statute runs anew once defendant makes a good faith effort to surrender); United States v. Greene, 146 F. 803, 890 (S.D. Ga. 1906), aff'd 154 F. 401 (5th

Cir.), cert denied, 207 U.S. 596 (1907) (defendants who resisted extradition could change their status as persons fleeing from justice by submitting to the jurisdiction of the court).

The instant prosecution is nevertheless not barred by the statute of limitations. The record clearly establishes that by October 10, 1977, defendant articulated his intent, throught a letter to the United States Embassy, thereafter to resist any efforts to be extradited to the United States on the Southern District charges. See note 2 supra. On December 14, 1977, he formally opposed extradition in proceedings commenced by Eastern District officials. There is no doubt that by resisting extradition on the Eastern District charges, defendant was "fleeing from justice" with regard to those

charges within the meaning of section 3290. United States v. Green, supra, 146 F. at 890. Furthermore, since "[section] 3290 reflects a congressional intent to deny a person fleeing from justice in any federal jurisdiction the protection of criminal limitations statute on all federal offenses," United States v. Gonsalves, supra, 675 F.2d at 1053, defendant's conduct regarding the Eastern District charges tolled the statute of limitations with regard to all federal offenses pending in the United States, including the offense charged in the instant indictment. The court therefore finds that the statute was tolled at least during the time that the extradition proceedings were actually pending, i.e., from December 14, 1977 until December 20, 1978. Accordingly, the prosecution is not barred by the five

year statute of limitations.(5)

B. Southern District Plan for Prompt Disposition of Criminal Cases

The judges of this court have enacted a Plan for Prompt Disposition of Criminal Cases (the "Plan") pursuant to the Speedy Trial Act of 1974, 18 U.S.C. sections 3161-74. Defendant claims that his rights were violated under Rule 3 of the Plan, which requires in relevant part that a person be indicted within 30 days of being delivered into the custody of a federal official in connection with the federal charge. Defendant asserts that since he was turned over to Southern District officials on April 3, 1981, but was not indicted until October 18, 1982, the indictment must be dismissed.

Defendant's argument is without merit. As the Government correctly argues, defendent was turned over to

Southern District officials on April 3, 1981 pursuant to the bench warrant issued by Judge Pollack to secure defendant's custody with regard to his prior narcotics conviction. Defendant had not yet been charged with the separate crime of failing to appear and was therefore not being held in federal custody with respect to that charge. Accordingly, the prosecution is not barred by the provisions of the Plan.

Conclusion

Defendant's motion to dismiss the indictment is denied in all respects.

So Ordered.

/s/ Hon. Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
March 1, 1983.

FOOTNOTES

1. According to the Government, immediate extradition was impossible since the extradition convention between France and the United States permitted the French Government to retain custody of defendant until defendant's prosecution and term of imprisonment, if any, on French charges were completed.

2. The record contains the following excerpt from tht letter (emphasis, spelling and punctuation in original):

> It is now my contention that 'if' and 'when' the United States Government does request again, the French Government for my extradition it can only do so based upon one charge; and that is the drug charge that I was arrested here for on March 4, 1977, and now contend, tht, "by the actions of the D.E.A. agents in paris, and the U.S. attorney in New York, by refusing a direct Court order of March 14, 1974, to seek and arrest me forthwith they have inturn been divested of all legal jurisdiction over my person by reasons of their illegal actions starting on March 10, 1977, here in Paris!

3. The extradition request was denied on December 20, 1978 on the ground that defendant was convicted on French charges on November 13, 1978 covering the same conduct as the Eastern District charges.

4. The forms purportedly executed by defendant are not a part of the record, and the Government does not concede that defendant formally consented to extradition. Since the court finds below that the statute was subsequently tolled for a sufficient period to render this prosecution timely in any event, the court assumes arguendo that the consent forms were executed.

5. Defendant claims that his sucessful resistance to the Eastern Distict's extradition request was warranted by the fact that he was being prosecuted in France for the same underlying conduct, and that this fact was subsequently recognized by the United States Attorney who ultimately moved for dismissal of these charges. However, resistance to extradition, even if legally justified, with the demonstrated intent of avoiding the resolution of the pending charges in the United States courts, is sufficient to toll the statute of limitations. See Greene, supra, 146 F. at 890.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

- against - S82 Cr. 706

ALFRED CATINO,

Defendant.
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ENDORSEMENT

Defendant Alfred Catino has moved to dismiss count two of the superseding indictment on the ground of improper venue. This count charges defendant with unlawfully using a United States passport to enter France. It is undisputed that on January 21, 1981, defendant was placed aboard an airplane bound for John F. Kennedy International Airport after completing a prison term in France. He was arrested at the airport by DEA agents on a narcotics indictment pending in the Eastern Distict of New York. After those charges were dismissed on April 3, 1981,

defendant was taken into custody by Southern District officials pursuant to a bench warrant which had been issued on March 17, 1975 by Judge Pollack of this court. On October 18, 1982, defendant was indicted for failing to appear before Judge Pollack. While defendant was in the Metropolitan Correctional Center ("MCC") awaiting trial on the bail jumping charge, the instant superseding indictment was filed containing both the bail jumping and passport charges.

The relevant statute governing this motion is 18 U.S.C. section 3238 which provides that where, as in the instant case, a crime is alleged to have been committed outside of any district, venue "shall be in the district in which the offender ... is arrested or first brought." Defendant claims that since he was first taken into custody on April 3,

1981 in the Eastern District of New York, venue for all known crimes which he is alleged to have committed abroad up to that time lies exclusively in the Easten District.

Defendant's argument must be rejected. The statutory reference to the district where the offender "is arrested or first brought" denotes "that district within the United States where the offender is first restrained of his liberty in connection with the offense charge." United States v. Erdos, 474 F.2d 157, 160 (4th Cir.), cert. denied, 414 U.S. 876 (1973)(emphasis added); see United States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954) (similarly construing prior statutory language). Since defendant was first arrested with regard to the passport charge while he was incarcerated in the MCC in the Southern

District of New York while awaiting trial on other charges, venue in this district is proper.

The court also finds no merit in defendant's addtional argument that the Southern District's purported failure to comply with internal Justice Department guidelines warrants the dismissal of the passport charge.

Defendant's motion to dismiss is therefore denied in all respects.

So Ordered.

/s/ Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
May 3, 1983

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 956—August Term, 1983

Argued: March 22, 1984 Decided: May 24, 1984

Docket No. 83-1419

UNITED STATES OF AMERICA,

Appellee,

—against—

ALFRED CATINO,

Defendant-Appellant.

Before:

LUMBARD, NEWMAN, and PRATT,

Circuit Judges.

Alfred Catino appeals from his conviction for failing to appear to begin serving a sentence, 18 U.S.C. § 3150, and for using an American passport obtained under a false name, 18 U.S.C. § 1542, entered June 4, 1983, in the Southern District of New York, Gagliardi, *J*. The indict-

ment for failure to appear was filed within the period set by the statute of limitations, and venue over the passport charge lay in the Southern District.

Affirmed.

ALAN SCRIBNER, ESQ., Contoocook, New Hampshire (Jeffrey D. Ullman, Esq., New York, N.Y., of counsel), *for Defendant-Appellant.*

DAVID S. HAMMER, Assistant United States Attorney, Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Benito Romano, Assistant United States Attorney, Southern District of New York, N.Y., of counsel), *for Appellee.*

LUMBARD, *Circuit Judge:*

Alfred Catino appeals from his conviction entered June 4, 1983, in the Southern District of New York, Gagliardi, *J.*, following his conditional guilty plea. Catino pleaded guilty to two counts: failing to appear on March 17, 1975, to begin serving a jail sentence imposed on a prior conviction, in violation of 18 U.S.C. § 3150; and, while a fugitive in France, using an American passport issued in a false name, in violation of 18 U.S.C. § 1542. The district court denied his motion to dismiss the bail jumping

charge as time barred, and his motion to dismiss the passport violation charge for lack of venue. We affirm.

I.

In January, 1974, Catino was convicted by a jury in the Southern District on two counts of narcotic law violations before Judge Pollack, who sentenced Catino on February 26, 1974, to two concurrent twelve year terms of imprisonment, to be followed by a special parole of six years, and $25,000 fine. Catino was released on a $50,000 appellate bond pending appeal.

On December 13, 1974, we affirmed Catino's conviction by order. Catino was instructed to surrender on March 17, 1975, to begin serving his sentence. When he failed to do so, Judge Pollack issued a bench warrant for his arrest.

On August 12, 1976, while still a fugitive, Catino applied for, and was issued, a United States passport in Boston under the name Frank Anthony Casta. He immediately used the passport to travel in and out of France.

In February, 1977, Catino was indicted in the Eastern District of New York for importing heroin into the United States from France, and for conspiracy to import heroin, in violation of 21 U.S.C. §§ 952(a), 963. At the same time, French police informed the United States Drug Enforcement Agency (DEA) that they had discovered Catino in Le Havre, in the presence of another suspected narcotics dealer.

Upon being informed of Catino's whereabouts, the United States Attorney in the Southern District requested, through diplomatic channels, that French police provisionally arrest Catino on Judge Pollack's outstanding bench warrant pending a formal extradition request. On

March 4, 1977, before such provisional arrest was made, however, the French police, under French law, arrested Catino, along with four other men carrying two kilograms of heroin, and seized Catino's passport. Two weeks later, the French government detained Catino pursuant to the Southern District's request for provisional arrest, pending a formal proceeding.

While in French prison awaiting trial, Catino wrote to, and was visited by, officials from the United States Attorney's Office and the DEA. Although there is no record in the Justice Department's files showing that Catino formally consented to extradition, he did at the time indicate his desire to return to the United States.[1]

Contemplating that French authorities would not return Catino until after his prosecution in France was complete and he had served his prison term, if any,[2] the United States, on April 27, 1977, applied to withdraw its earlier request for Catino's provisional arrest and indicated it would renew the request at a later time. On May

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1 Catino contends that he signed a waiver form at the French Ministry of Justice in March, 1977, but that, since the Southern District withdrew its request for provisional arrest and never perfected its extradition request, the form was never sent to the Justice Department. In any event, on March 15, 1977, Catino wrote to DEA Agent Ronald Provencher at the American Embassy, requesting him to talk to Assistant United States Attorney James Lavin and "ask him how fast he can get me back to New York! I don't think I can last another month here."

2 The Extradition Convention, Jan. 6, 1909, United States-France, artic. IX, 37 Stat. 1526, as amended, February 12, 1970, 22 U.S.T. 407, provides:

> If the person whose extradition may be claimed, pursuant to the stipulations hereof, be actually under prosecution for a crime or offense in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred until such proceedings be terminated and until such criminal shall be set at liberty in due course of law.

16, 1977, Catino was freed from the detainer for extradition. The next day, however, a DEA agent visited Catino in prison and told him that despite the withdrawal of the detainer, the United States would seek extradition again after the resolution of the then pending French charges.

Over the next few months, Catino had a change of mind. On October 7, 1977, he wrote to the United States Embassy in Paris, stating that the United States was "divested of all legal jurisdiction over my person" because it had allegedly delayed extradition proceedings until after the French police arrested him on their own charges.

Ten days later, on October 17, the United States formally requested Catino's extradition, based on the February 1977 narcotics importation indictment filed in the Eastern District of New York. Catino opposed this request in proceedings before a French tribunal, which deferred its decision pending additional evidence requested from the United States.

On November 13, 1978, during the pendency of the extradition proceedings, Catino was convicted on the French charges, and sentenced to 5 years in prison and fined. The court also ordered that, after serving of the prison term, he be "permanently barred residence in French territory."

The French government then opposed the extradition request on the grounds that as to both the importation and conspiracy charges, he already had been convicted for the same conduct in France, and on December 20, 1978, the extradition tribunal denied extradition.

Catino completed serving his French sentence on January 21, 1981. French authorities immediately enforced the expulsion order by placing Catino on a plane bound for John F. Kennedy International Airport, located in the

Eastern District of New York. Upon his arrival, Catino was arrested by DEA agents on a warrant pursuant to the 1977 Eastern District narcotics importation indictment.

On April 3, 1981, however, the Eastern District indictment was dismissed on the government's motion and Catino transferred to the custody of the Southern District in compliance with the fugitive warrant issued by Judge Pollack in March, 1975, and began serving the sentence imposed upon him in January, 1974.

On October 18, 1982, seven and a half years after Catino had become a fugitive, he was indicted in the Southern District for bail jumping, 18 U.S.C. § 3150. On March 1, 1983, the district court denied Catino's motion to dismiss the indictment for being time barred.

On March 15, 1983, before trial of the the bail jumping charge,[3] a superseding indictment was filed in the Southern District, which added a charge that while in France, he used the United States passport issued to him under the false name Frank Casta. Castino's motion to dismiss the passport count, on the ground that venue for the charge lay exclusively in the Eastern District, was denied on May 5, 1983.

Pursuant to an agreement with the government which preserved his right to appeal from the denial of his motion to dismiss, Catino pleaded guilty on June 4, 1983, to both counts of the superseding indictment. On November 18, 1983, the district court sentenced Catino to three years in prison on the bail jumping charge, to run consecutively to the twelve-year sentence he was then serving, and three years' special probation on the passport charge, to follow his release from prison. We affirm.

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[3] At this time, Catino was in the Metropolitan Correctional Center in the Southern District of New York.

The federal statute of limitations for non-capital crimes, 18 U.S.C. § 3282, declares that no person may be prosecuted "unless the indictment is found or the information instituted within five years" after the commission of the offense. The statute, however, does not run in favor of "any person fleeing from justice." 18 U.S.C. § 3290. This exception is comprehensive, in that a person fleeing from justice in one jurisdiction loses the benefit of the statute of limitations for all charges in all federal jurisdictions. *United States v. Gonsalves*, 675 F.2d 1050, 1052-53 (9th Cir.), *cert. denied*, 103 S.Ct. 83 (1982) (flight from Nevada tolled statute in California); *King v. United States*, 144 F.2d 729, 731 (8th Cir. 1944), *cert. denied*, 324 U.S. 854 (1945) (flight from Texas tolled statute in Arkansas).

Catino concedes that he became a "person fleeing from justice" upon his failure to appear for sentencing in March, 1975, but Catino argues that his fugitive status ended in March, 1977, when he consented to extradition to the Southern District. Although the government agrees that a fugitive who executes a formal and voluntary consent to extradition regains the benefit of the statute of limitations, *United States v. Gonsalves*, *supra*, 675 F.2d at 1055 (statute begins to run upon good faith effort to surrender), it disputes whether Catino had actually done so.

The district court assumed arguendo that Catino had consented to extradition in March, 1977, but declined to make a factual finding on this point, as, in its view, the issue was irrelevant. As evidenced by his letter of October 10, 1977, Catino obviously had changed his mind about returning to face imprisonment as well as new charges in

the United States. On December 14, 1977, Catino opposed an extradition request made by the Eastern District, and continued to do so until the request was denied on December 20, 1978. The court reasoned that, whatever Catino's status from March through December 1977, his resistance to extradition to the Eastern District made him a "person fleeing from justice" with regard to those charges, at least until the extradition proceedings ended. Since tolling of charges in one district tolls the statute in all federal districts, the court concluded that prosecution in the Southern District for bail jumping was not time barred. We agree.

The tolling provision of 18 U.S.C. § 3290 commences when a person absents himself from a jurisdiction where an offense has been committed with the intent of avoiding arrest or prosecution. *Jhirad v. Ferrandina*, 486 F.2d 442 (2d Cir. 1973) (*Jhirad I*). A person can be "fleeing from justice" in one jurisdiction even though in prison in another. *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956). Catino concedes that a fugitive who is imprisoned in a foreign jurisdiction and then resists his return to the United States may *remain* a "person fleeing from justice," *United States v. Greene*, 146 F. 803 (S.D. Ga. 1906), *aff'd*, 154 F. 401 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907); *cf. United States v. Estremera*, 531 F.2d 1103, 1108 (2d Cir.), *cert. denied*, 425 U.S. 979 (1976) (during time defendant resisted deportation proceedings in Canada instituted in good, faith by United States officials he loses, protection of Speedy Trial Act). However, he argues that a non-fugitive cannot *become* a fugitive by virtue of his resistance to extradition. We disagree.

The intent to flee from prosecution or arrest may be inferred from a person's failure to surrender to authorities once he learns that charges against him are pending.

Matter of Assarsson, 687 F.2d 1157, 1161-62 (8th Cir. 1982); *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1324 (9th Cir. 1978). This is true whether the defendant leaves the jurisdiction intending to avoid prosecution, or, having learned of charges while legally outside the jurisdiction, "constructively flees" by deciding not to return. *Jhirad v. Ferrandina*, 536 F.2d 478, 483-84 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976) (*Jhirad II*). The fact that the authorities know of the defendant's whereabouts outside of the jurisdiction does not of itself start the statute running. *Jhirad II*, *supra*. Even in such circumstances, the statute is tolled until the defendant takes steps to return.

This is a somewhat harder case than *Assarsson* and *Jhirad II*, however. In both those cases, the defendants moved freely about outside the jurisdiction where charges were pending against them, and were thus free to return to face prosecution. Here, at the moment that, according to the district court, Catino regained fugitive status, he had no such control over his movements, as he was in French prison awaiting trial on French charges.

Although Catino's imprisonment prevented him from returning, we do not think he was relieved of a duty to do all he could to return. As it was, instead of consenting to return to the United States, he actively resisted the extradition request throughout the proceedings. This fact, coupled with his letter expressing a desire to resist all future extradition requests, constituted a constructive flight from justice, thereby tolling the statute of limitations period.

We need not decide whether Catino regained the benefit of the statute of limitations upon the French refusal in December 1978 to grant extradition to the Eastern Dis-

trict, as, in any event, the Southern District indictment of October 1982 was returned within the limitations period.[4]

We disagree with Catino's argument that the district court's holding impermissibly penalizes a defendant for asserting his right to oppose extradition since "to claim the benefit of the statute of limitations, he would have to give up his right to resist unlawful extradition." First, his argument mischaracterizes the nature of the Eastern District's extradition request. There was nothing illegal about that request; it simply proved unsuccessful. Catino was extraditable, as Article II of Extradition Convention between France and the United States includes traffic in, and possessin of, heroin and other narcotics as extraditable offenses. However, France chose to exercise its discretion, pursuant to Article IX of the Convention, *see* n.2 *supra*, to prosecute Catino under its own laws and have him serve his French sentence, if any, before extradition.

More fundamentally, Catino's contention that the tolling of the statute of limitations depends on the merits of his arguments in extradition proceedings is unsound. However meritorious Catino's arguments were, "[i]t is the intent to avoid the jurisdiction and processes of the courts in the judicial district in which the crime is charged to have been committed which takes away from the person charged the privilege of pleading the statute of limitations. *United States v. Greene*, *supra*, 146 F. at 890.

Of course, Catino faced a choice whether to exercise his right to oppose extradition, or gain the benefit of the

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[4] Even if, as the district court assumed arguendo, the statute was running from March, 1977, to December, 1977, when Catino opposed extradition, there would have been four years and three months left under the statute when France denied extradition in December, 1978. Catino's indictment in October, 1982, would thus have been within the limitations period.

statute of limitations by fulfilling his duty to do all in his power to return to the United States. In the case where a defendant chooses the former course, the price for that choice is loss of the benefit of the statute of limitations. Nor is there any merit to the argument that it is unconstitutional to require a defendant to make such a choice. *Cf. McGautha v. California*, 402 U.S. 183, 213 (1970) (in a capital case in which guilt and punishment determined in same trial, defendant who chooses to testify concerning punishment may be compelled thereby to waive privilege against self-incrimination concerning guilt).

III.

Catino challenges his conviction for misuse of an American passport on two grounds.[5] First, he argues that he could not be tried in the Southern District on this charge, as venue lay exclusively within the Eastern District. Second, Catino argues tht even if venue lay in the Southern District, the government violated Justice Department policy by prosecuting him for a crime for which he had already been convicted in France, without first obtaining the approval of the United States Attorney General. We find both of these contentions to be without merit.

Count Two of the superseding indictment charged that Catino, while in France, used a falsely secured American passport, in violation of 18 U.S.C. § 1542. As this offense was alleged to have been committed outside the jurisdiction of any district, venue lies only "in the district

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5 The statute of limitations period for a passport charge brought under 18 U.S.C. § 1542 is ten years, *see* 18 U.S.C. § 3291, and thus is not available as a basis for challenging the conviction.

where the offender is arrested or first brought." 18 U.S.C. § 3238. Catino contends that in his case, for all crimes committed outside the United States, venue lies exclusively in the Eastern District under either the "first brought" or "arrested" tests, as the plane on which French officials placed him landed at Kennedy Airport, located in the Eastern District, and DEA agents arrested him there pursuant to an Eastern District warrant on the heroin importation charge.

We need not concern ourselves with the term "first brought," as that applies only in situations where the offender is returned to the United States already in custody. *United States v. Provoo*, 215 F.2d 531, 537 (2d Cir. 1954); 8A Moore's Federal Practice ¶ 18.03[2] at 18-22 (2d ed. 1983). Here, Catino was not arrested until he arrived in New York.

Where a defendant is not taken into custody before his arrival in this country, "the purpose of the venue statute is not to fix the place of arrest but simply to have the place of trial conform to the place of arrest." *United States v. Provoo*, *supra*, 215 F.2d at 538. Courts consistently have interpreted "arrested" in § 3238 to mean that "venue is in that district. . . where the defendant is first restrained of his liberty *in connection with the offense charged*." *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973) (emphasis added); *United States v. Provoo*, *supra*.

Upon his return, Catino was immediately arrested in the Eastern District on narcotics trafficking charges. After those charges were dropped he was further restrained so that he could be transferred to the Southern District to begin serving a previously imposed sentence. It was not until March, 1983, when Catino was already in custody at the Metropolitan Correctional Center in the

Southern District that he was indicted and arraigned for *passport* violations. It is irrelevant that the government could have charged Catino in the Eastern District for the passport charge, as the statute does not dictate the place of arrest. *United States v. Provoo, supra.* Since the Southern District was the district where Catino was actually restrained in connection with the passport charge, venue lay exclusively within that district.

United States v. Provoo, supra, is not to the contrary. There, a serviceman who had returned from overseas, not already in custody, was arrested by military authorities in Maryland on sodomy charges. After the charges were dropped, however, the military authorities continued to hold him, and brought him under guard to New York, where he was arrested, indicted and tried by civil authorities for treason allegedly committed while a Japanese prisoner of war. Interpreting a predecessor of § 3238, which placed venue for extraterritorial offenses "in the district where the offender is found, or into which he was first brought,"[6] we found that venue for the treason charge was properly in Maryland. As the army continued to hold him in Maryland after the sodomy charge was dropped solely in order to send him to New York to be tried for treason, we concluded that this continued restraint "was an apprehension for treason." Thus, he was "found" in Maryland within the meaning of the venue statute. 215 F.2d at 538. Had the court read the statute as Catino now urges us to read § 3238, it would not have had to explain why Provoo's continued restraint in Maryland constituted an arrest on the treason charge. Instead, it would have stated that the defendant was first arrested

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6 Under the old statute, "found" meant "arrested." 8A Moore's Federal Practice ¶ 18.03[2] at 18-22 n.29.

in Maryland on sodomy charges, and therefore venue for all extraterritorial crimes lay in Maryland.

Cartino argues that even if venue lay in the Southern District, his conviction on the passport charge should be dismissed because the government violated the "*Petite* policy" by prosecuting him without first obtaining the consent of the Attorney General. He claims that this approval was needed because he had already been convicted in France on similar charges. We disagree.

The "*Petite* policy" refers to Justice Department guidelines first announced by the Attorney General in 1959, and discussed by the Supreme Court in *Petite v. United States*, 361 U.S. 529 (1960). As currently applied, the policy precludes successive federal prosecutions against a defendant for offenses arising out of a single transaction, or federal prosecutions for offenses already prosecuted at the state or local level, without the approval of the Attorney General. United States Dep't of Justice, United States Attorneys' Manual, Tit. 9, § 2.142 (1980).

By its own terms, the *Petite* policy speaks only to domestic prosecutions, not foreign ones as are involved here. Even as regards a federal prosecution following a state conviction for the same conduct, however, the policy affords defendants to substantive rights. It is "merely an internal guideline for exercise of prosecutorial discretion, not subject to judicial review." *United States v. Ng*, 699 F 2d 63, 71 (2d Cir. 1983).

The convictions on both counts are affirmed.